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SUMMARY RECORD OF THE 3rd PLENARY MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Tuesday, 16 June 1998, at 10 a.m.

President: Mr. CONSO (Italy)

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The meeting was called to order at 10.10 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1)

1. **Mr. ROGOV** (Kazakhstan) said that his country, which had attained its independence with the collapse of the Soviet empire, was extremely concerned to maintain and consolidate its sovereignty. Because it desired independent protection for its fundamental institutions, Kazakhstan supported the creation of an international criminal court.

2. The United Kingdom representative had expressed concern about extradition proceedings in connection with the establishment of such a court. Kazakhstan's Constitution did not entirely rule out the extradition of its citizens. However, it believed that maximum account must be taken of universal human rights and also of the sovereignty and independence of each State.

3. Kazakhstan supported the creation of an international criminal court as an independent judicial body, with clearly defined jurisdiction and mechanisms for criminal prosecution. It also supported the proposals for the Statute. The Court should be an independent international organization in relationship with the United Nations through agreements adopted by the States parties.

4. The crimes falling within the Court's jurisdiction should be clearly defined and genocide, crimes against humanity and military crimes and aggression should unquestionably be included, but only on the basis of such a clear definition.

5. Kazakhstan considered that extending the Court's jurisdiction to drug trafficking did not accord with the principle of complementarity, since it was not always possible for national judicial systems to punish such crimes. As far as genocide and military crimes were concerned, the Court should take action at the initiative of States and the Security Council. For other crimes, the consent of the State on whose territory or against whose interests the crime was committed would be necessary.

6. The Court should be funded by contributions from States. But since not all States were able to make such contributions, such costs should be covered in the first stage out of the United Nations budget with the approval of the General Assembly. Kazakhstan considered it the sovereign right of every State to enter reservations in signing and ratifying the Statute. But, on questions of jurisdiction, initiating prosecutions, financing and other matters, the right to reservation should be limited, since it might undermine the international jurisdiction of the Court. Each State should be able to decide on the degree to which it should participate in the Court.

7. **Archbishop MARTINO** (Holy See) said that any international criminal court must protect the dignity of the human person, a dignity shared by all irrespective of age, race, ethnic origin, status as a combatant or non-combatant, sex or stage in human life, from the unborn to the elderly. The Statute and the crimes falling within the Court's jurisdiction must reflect that equal dignity.

8. The principle of *suum cuique*: to each person his due, was therefore an important one in the justice dispensed by an international court. In the words of His Holiness Pope John Paul II, the recognition that the human person was by nature the subject of certain rights that no individual, group or State might violate was an essential principle

of international law. Those who had been harmed were owed the protection of the law and those responsible for the heinous crimes to be dealt with by the Court must be held accountable in accordance with universal norms. But the Court must be conceived as a means not of seeking revenge but of finding reconciliation. In handing down its sentences the Court must always bear that goal in mind, and the Holy See was convinced that the death penalty had no place in the Court's Statute.

9. That Statute must also ensure the Court's independence from political concerns and pressures, especially those reflecting the particular rather than the universal, the exclusive rather than the inclusive. All were equal before the law, and the place in the proposed Statute of rules based on political rather than juridical considerations was questionable.

10. **Mr. MULADI** (Indonesia) said that the Court's effectiveness would depend on universal accession by States to the Statute, and that, to ensure the acceptability of the Statute, a set of fundamental issues had to be resolved in accordance with the aspirations of a majority of States. Those issues included the definition and implementation of the principle of complementarity, the so-called "trigger mechanism", the integrity and independence of the Court and the list of crimes under its jurisdiction.

11. The recent Ministerial Meeting of the Non-Aligned Movement in Cartagena had emphasized that adoption of the Statute by consensus would be the best way of guaranteeing the Court's universal character. Indeed, the rules of procedure stated that the Conference should endeavour to ensure that its decisions were reached by general agreement.

12. In drafting the Statute, the Conference must uphold the principle of respect for national sovereignty and join the emerging consensus that the Court's jurisdiction should be complementary to that of national courts and based on the consent of the States concerned. The countries of the Non-Aligned Movement considered that the principle of complementarity was fundamental and should apply to all the provisions governing the Court.

13. The aim of complementarity was to ensure that the Court would act to bring to justice the perpetrators of heinous crimes only when national justice systems were unavailable to do so. However, that principle still had to be defined unambiguously. Further intensive negotiations were still required, notably on when the Court's mechanism should be activated, whether the Court should unconditionally respect the principle of *ne bis in idem*, including decisions already made by national judicial systems, or whether it should be granted the power to act as an international supreme court delivering judgement on the credibility of national courts.

14. Those questions were political, not legal ones. But to safeguard the Court's credibility and impartiality they should be resolved by the Conference, not left to the Court itself to decide.

15. The Court would require both adequate resources and freedom from political intervention if it were to be effective. Without universal support, it would lack the capability and capacity to discharge its mandate or enforce its decisions. The Statute must therefore guarantee that all States parties had equal rights and obligations with respect to the jurisdiction of the Court.

16. At the Cartagena meeting, the Non-Aligned countries had reaffirmed that the Court must be independent of political influence of any kind, including that of the United Nations and in particular the Security Council, which must not direct or hinder its functioning. They had also stressed the need to set up a suitable method of funding the Court and to ensure respect for the principle of *nullum crimen sine lege*.

17. **Mr. BOUGUETAIA** (Algeria) said that there was a clear need for an effective and objective international court to deal with crimes under international law, which would obviate the necessity for ad hoc tribunals. The Court had to have guarantees of independence and impartiality.

18. The Court would be the more credible and find wider acceptance if its scope was limited. It should therefore focus on the core of serious crimes that threatened international peace and security. Terrorism and drug trafficking should be included in the list of crimes within its jurisdiction.

19. The principle of complementarity would play an important part in arriving at a proper balance between the jurisdiction of the future International Criminal Court and that of national courts. Clearly, the latter must have the right to exercise their jurisdiction with respect to the crimes listed in the draft Statute in full sovereignty. The court would replace them only in the event of proven shortcomings.

20. Moreover, the Court would have to cooperate with States, the major players on the international political scene, in strict respect for the authority and competence of each, so as to ensure acceptance and universality.

21. **Mr. TELIČKA** (Czech Republic) said that the Court should have inherent jurisdiction over the four core crimes of genocide, war crimes, crimes against humanity, and aggression, which were regarded as crimes under customary international law. In accordance with the principle of universal jurisdiction over crimes under international law, no further State consent should be required before the Court could proceed. He proposed that war crimes committed in non-international armed conflict should also come under the jurisdiction of the Court.

22. His delegation supported a mutually complementary relationship between national criminal jurisdiction and the jurisdiction of the Court. Complementarity did not diminish the responsibility of States for the vigorous investigation and prosecution of crimes. His delegation could not accept the idea that, if a national justice system investigated or prosecuted a case, the Court should not be entitled to exercise jurisdiction, for that interpretation of the complementarity principle would seriously undermine the Court's effectiveness. The Court must be equipped with a safeguard against sham investigations and trials.

23. The question of the role of the Security Council had provoked heated debate in the Preparatory Committee. His delegation agreed that an act of aggression might not be prosecuted under the Statute unless the Security Council had first determined that a State had committed such an act, but could not support the idea that the Security Council should have the power to prevent proceedings before the Court if the situation was being dealt with by the Security Council itself under Chapter VII of the Charter. Chapter VII situations were precisely those in which crimes within the Court's jurisdiction were most likely to be committed. The role envisaged for the Security Council would radically change and indeed undermine the independence of the Court.

24. His delegation believed that the Prosecutor should be empowered to initiate proceedings before the Court of his or her own accord. That would make the Court more effective and would open it up to inputs from various sources, including non-governmental organizations and individuals.

25. One of the most important issues in the Statute was the part dealing with rules of international cooperation and judicial systems. His delegation considered that the Statute must oblige all States parties to comply strictly with any request for assistance issued by the Court. No exception should be allowed to that fundamental rule; the Statute should contain a provision barring any reservations that would enable States parties to evade that obligation. That was the best way to ensure equality of obligations and to eliminate potential stumbling blocks.

26. Mr. KOUAKOU BROU (Côte d' Ivoire) said that the proposed Court must be independent and universal. No State or other body should have the right to interfere in its operations. The independence of the Court would in no way affect the prerogatives of the various organs of the United Nations, which, on the contrary, by remaining outside legal matters, would lose none of their essential functions in the service of international peace and security.

27. With regard to the crimes provided for under the Statute of the Court, his country considered it essential to maintain the principle of complementarity to preserve the sovereignty of States and ensure the Court's universality.

28. Mr. ASMANI (United Republic of Tanzania) endorsed the statement made by the South African representative on behalf of the South African Development Community.

29. The International Criminal Court had to be truly independent, effective, impartial and permanent. It must not become a tool for the political convenience of States.

30. The regime of human rights derived its legitimacy from their universality, and the same would apply to the Court. Some aspects of the idea of sovereignty were a potential bar to the common will to punish heinous crimes, but the Court must ensure that State sovereignty became a concept of responsibility and international cooperation rather than an obstacle to the enjoyment of universal human rights.

31. Useful proposals had been made for balancing the responsibilities of the Security Council under the Charter on the one hand and the role of the Court for the independent determination of individual culpability on the other, and needed to be pursued seriously. Since the Court was being established to address the most serious international crimes, the customary distinction between international and non-international armed conflict needed re-examination so as not to justify the exclusion from the Court's jurisdiction of the serious crimes frequently committed in internal armed conflicts.

32. The role of the Security Council in relation to the Court had to be approached with great care. The preservation of the Court's integrity must be the overriding concern of the Conference. In that connection, his delegation saw a role for an independent Prosecutor who, subject to specified safeguards, would have ex officio powers to initiate investigations and prosecutions, and the integrity of whose office would discourage the submission of frivolous claims.

33. His delegation subscribed to the complementarity regime between the Court and national judicial systems and agreed that primary jurisdiction lay with national courts. However, in view of the events leading to the genocide in Rwanda, it considered that, in the event of a dispute on jurisdiction, the Court should be the final arbiter.

34. His Government looked forward to the establishment of a Court that would have the widest support and participation of States and for a close alliance between the Court and the United Nations. He hoped it would be an institution that would be able to act when national courts could not do so or were seen as being ineffective.

35. Mr. WANG Guangya (China) said that his Government believed that the Court, to be independent and fair, should not be subject to political or other influence, and should not become a tool for political struggle or a means of interfering in other countries' internal affairs. However, it should not compromise the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security. The provisions of its Statute should not run counter to those of the United Nations Charter, and the Conference should be prudent in dealing with the relationship between the Court and the United Nations and the role of the Security Council.

36. His Government believed that universal participation was essential for the authority and effectiveness of the Court. In order to ensure such participation, the Statute should be based on the principles of democracy and equality and should give expression to the positions and views of all countries. It should be adopted by consensus rather than by vote. Maximum flexibility should be exercised in defining the jurisdiction of the Court, the crimes that could be prosecuted, and the modes in which countries accepted the Court's jurisdiction.

37. Complementarity was the most important guiding principle of the Statute and should be fully reflected in all its substantive provisions and in the work of the Court, which should be able to exercise jurisdiction only with the consent of the countries concerned. Its jurisdiction should not apply when a case was already being investigated, prosecuted or tried by a given country.

38. His Government considered that a cautious approach should be adopted when addressing such questions as trigger mechanisms and means of investigation, in order to avoid irresponsible prosecutions that might impair a country's legitimate interests. In carrying out its duties, the Court would rely on the cooperation of the countries concerned but should respect their sovereignty, security and basic principles of law.

39. Mr. BIRKAVS (Latvia) said that despite the clear need for an international criminal court, the Statute must not be pushed through just for the sake of creating a symbolic entity. The Court must be viable and effective, operating in conjunction with other institutions: it must really work.

40. The Statute should clearly define the Court's jurisdiction, spelling out the crimes of a serious nature with which it would deal, including the crime of aggression.

41. The Court should be financed from the regular United Nations budget, supplemented by voluntary contributions as needed. The ability to pay expenses promptly and in full was essential if the Court was to be viable and effective. A diversified source of funds was the best possible guarantee of the Court's financial security, and would also ensure its universality by encouraging financially weaker States to become parties to the Treaty. The Statute should address budgetary considerations to ensure that all States as well as the Court itself were able to initiate proceedings without incurring undue financial burdens. Justice should be available to all regardless of their financial means.

42. The Court should have the same jurisdiction over core crimes as States currently had under international law, in accordance with the principle of universal jurisdiction. His delegation supported the idea that ratification of the Treaty would signify immediate acceptance of the Court's jurisdiction over the core crime. Since a permanent international criminal court would have no law enforcement capacity at its disposal, cooperation and judicial assistance by States would be vital to its smooth functioning.

43. His delegation fully endorsed the position that the Court was intended to complement national criminal justice systems only in cases where those systems were not available or were ineffective, and agreed that the Court should have the authority to determine whether that applied. The Statute should include a detailed definition of the principle of complementarity and of the procedures to be applied by States and the Court in determining jurisdiction and associated issues.

44. Mr. VERGNE SABOIA (Brazil) said that reaching a minimum common denominator in drafting the Statute was not an acceptable solution. If States decided to create a court, they should give it the power and the means to play a significant role in international life, but the Court must in no way weaken or jeopardize existing conventional or customary rules of international law. It was also necessary to encourage universal participation, and the aim

should be to achieve a proper balance between different national positions with respect to certain key provisions of the Statute.

45. With respect to the initiation of proceedings before the Court, Brazil considered that, in addition to the rights of States parties and of the Security Council to trigger the Court's jurisdiction, there should be an independent Prosecutor with the authority to initiate investigations ex officio or on the basis of information received from various sources. However, to avoid frivolous politically motivated complaints, the Statute should provide adequate safeguards on the Prosecutor's discretion.

46. The Court's jurisdiction should be limited to the most serious crimes of concern to the international community. Brazil favoured inherent jurisdiction over the crime of genocide, but believed that there were convincing arguments for retaining some kind of "opt-in" mechanism for the other core crimes. Observance of the distinction between acceptance of the Court's Statute and its jurisdiction would help signatories to expedite ratification procedures and promote universal acceptance.

47. The Court's relationship with the Security Council remained a matter of concern to many delegations. Brazil believed it necessary to remove justification for the creation of new ad hoc tribunals by the Security Council, which would require a provision such as draft article 10 (1). The Court should not, however, act as a subsidiary organ of the Security Council and must aim for the highest level of judicial independence. Only in exceptional circumstances should it be prevented by the Security Council from investigating or prosecuting cases when the Council, acting under Chapter VII of the Charter, took a formal decision to that effect. Even in such cases, however, the Court should not be prevented from exercising its jurisdiction for more than a limited period.

48. Mr. PAKALNIŠKIS (Lithuania) said that his country considered that the Court must be given inherent jurisdiction over the crimes listed in the Statute but only in cases where national courts were unable or unwilling to proceed. The Court should be given the power to decide whether it was able to exercise jurisdiction over certain crimes.

49. The Court's jurisdiction should apply to genocide, war crimes, crimes against humanity, and aggression. As a party to the Geneva Conventions of 1949, Lithuania endorsed the list of crimes set out in those Conventions. In negotiations on the laws applying to armed conflicts and the definition of serious violations, it was in favour of recognizing a deliberate change in the demographic situation of occupied territories as a crime. Moreover, rape, sexual abuse and other forms of sexual violations should be recognized as war crimes and crimes against humanity. Lithuania was also in favour of including war crimes committed during internal armed conflicts in the crimes listed in the Court's Statute.

50. One of Lithuania's major objectives was to include aggression as a crime against peace, since experience showed that an act of aggression often led to genocide, crimes against humanity and war crimes.

51. His delegation was in favour of a short definition including clear legal criteria in determining the substance of a crime. In view of the political sensitivity of the issue, it agreed with the principle of empowering the Security Council to determine aggression.

52. The Conference had to create an institution independent of the political power of States or other bodies and able to adopt fair and impartial decisions. The independence of the Court would be reinforced by empowering the Prosecutor to start investigations ex officio. The right to review such investigations should be vested only in the Court.

53. The Security Council, acting in accordance with Chapter VII of the Charter, would play an important role in referring cases to the Court but it should not be able to interrupt or suspend the Court's proceedings; such action should be possible only by the Court's own express decision. That would provide the basis necessary for States to cooperate with the Court. The Statute of the Court should spell out the obligation of States to cooperate with it, and at the same time should indicate the forms of cooperation, and, if agreed, the grounds for any refusal to cooperate.

54. Mr. HERMOZA MOYA (Peru) said that his country had been involved in the work of the Preparatory Committee; its participation in the present Conference demonstrated its support for the establishment of an international criminal court to bring to justice those accused of the most serious crimes.

55. Peru believed that the International Criminal Court should be permanent and independent. It must be complementary to domestic systems of justice. Peru also supported the principle of the broadest possible judicial cooperation. Given the importance of the subject, the agreements to be reached at the Conference should be adopted by consensus.

56. Ms. ZAMFIRESCU (Romania) referred to the text of her delegation's statement indicating its position.

57. A permanent, universal, independent and strong international criminal court empowered to prosecute and convict persons responsible for genocide, crimes against humanity and war crimes would not only overcome the disadvantages of ad hoc tribunals but also act as a potential deterrent.

58. The purpose of the new Court was to ensure that persons guilty of the most heinous crimes did not go unpunished. A balance had therefore to be struck between the jurisdiction of the Court and that of national criminal justice systems, in accordance with the carefully worded formula in the draft Statute before the Conference.

59. The efficiency of the Court would depend on the universality of its jurisdiction, based on the will of States to give full cooperation and comply with the Court's requests for assistance and with its judgements.

60. Cost-effectiveness was important but it was also important not to water down achieved standards of respect for human rights. Unless the Court were independent and strong, it could not be effective. Although separate, it should not, however, be entirely separable from the other bodies of the United Nations system dealing with matters relevant to its activity. It was proper that, under Chapter VII of the Charter, the Security Council should be able to refer to the Court situations in which crimes coming under its jurisdiction appeared to have been committed and gone unpunished.

61. Flexibility and compromise were essential in the current exercise, but she hoped that the Conference would do more than agree on the lowest possible common denominator. Moreover, it was essential to ensure that the Court was given the necessary financial resources to do its work.

62. She hoped that ratification would be swift so that the Court could come into operation as soon as possible, preferably before the third millennium. Her delegation agreed that The Hague would be the proper seat for the Court.

63. Mr. WAKO (Kenya) reaffirmed Kenya's commitment to the establishment of an effective, impartial, credible and independent international criminal court, free from political manipulation, pursuing only the interests of justice, with due regard to the rights of the accused and the interests of the victims. For the Court to be universal, the

remaining unresolved issues must be addressed comprehensively, and a proper balance struck. There must therefore be a strong political will on the part of the States parties that would sign and ratify the Statute. Consensus was the only way to guarantee the early establishment of the Court and preserve its integrity and universality. His delegation would support all efforts to that end.

64. The principle of complementarity was central to the basic notion of the international criminal justice system. While primary responsibility for prosecuting those who committed crimes rested with each State and the International Criminal Court should not act where effective national criminal justice systems were in place, it should certainly do so where such systems were not available or were ineffective.

65. The serious crimes over which the Court would have jurisdiction had to be spelt out clearly and exhaustively.

66. The Prosecutor played an essential role in the Court and his or her functions were critical. The Prosecutor's powers to investigate and initiate prosecutions ex officio should be clearly defined in order to avoid the risk of abuse. His or her accountability should be safeguarded by a strict review of procedure conducted by a pre-trial chamber vested with powers to ensure that no charges were brought without good cause.

67. The relationship between the Security Council and the Court needed to be clarified to ensure that the independence and legitimacy of the Court were not undermined. A suitable mechanism for financing the Court had to be set up in order to preserve its independence.

68. Parallel with the attempts to establish an international criminal court, national institutions to preserve and embody the rule of law and effective democratic systems at all levels must be strengthened. The World Conference on Human Rights in Vienna had called upon the international community to assist developing countries in their efforts to strengthen their institutions in their justice administration systems, including the courts. Since the primary responsibility for enforcing any penal system lay with States, efforts must be made to strengthen such national institutions.

69. Mr. SHARSHENALIEV (Kyrgyzstan) supported the concept of an international criminal court with its seat at The Hague.

70. Such a court should not be used in any country's political interests, and membership should involve full recognition of its competence. That in no way lessened the responsibility of States to investigate crimes and initiate criminal proceedings.

71. The Court should complement national legislative bodies and should have competence in matters of genocide, military crimes and crimes against humanity. Kyrgyzstan supported the proposal to extend the Court's jurisdiction to terrorism, illicit drug trafficking and crimes against United Nations personnel. It also supported the appointment of a strong Prosecutor with powers to initiate proceedings ex officio where sufficient grounds existed, and believed that that would not infringe the rights of the Security Council.

72. Ms. NAGEL BERGER (Costa Rica), speaking as a woman and as Minister of Justice of her country, stressed the need to give the Court full powers to deal with all crimes in which the dignity of women was violated. The Statute must therefore include the crimes of rape, sexual slavery, prostitution and forced sterilization, as well as the recruitment of minors into the armed forces.

73. The Court's structure and machinery should be given a proper gender perspective, and provision should be made for adequate representation of both women and men in all its structures. Advisory legal services in matters affecting women and children and a special unit for victims and witnesses were needed if the Court were to function properly.

74. The list of crimes falling within the Court's jurisdiction should cover all serious violations of human rights, including genocide, war crimes and crimes against humanity. The concept of war crimes must include all those committed during internal conflicts and covered by the 1977 Additional Protocols to the 1949 Geneva Conventions. In view of the deplorable experience of Latin America, the Court should also be able to deal with the crime of forced disappearances. Moreover, it should have competence in matters of international terrorism, drug trafficking and crimes committed against United Nations personnel, and should be enabled to deal with other crimes, such as aggression, in the future.

75. The Court must be truly impartial and free from political interference, and should therefore not be subordinate to the Security Council. However, the Security Council should be able to refer situations for its consideration when peace and security were involved, even when the States concerned did not explicitly accept the jurisdiction of the Court.

76. Moreover, the Court should be competent to judge the most serious crimes wherever they might have been committed. Ratification by a limited number of States should suffice to give the Court universal jurisdiction. Her delegation did not agree that ratification by the States directly concerned should be a prerequisite for the exercise of jurisdiction. It was also opposed to additional declarations by such States either on ratification or in connection with a particular case.

77. The Prosecutor should be truly independent and competent to initiate investigations ex officio on the basis of reliable information from any source, including non-governmental organizations, and ways should be explored of enlisting the cooperation of such operations and of the survivors of serious crimes.

78. The Court must complement the work of national justice systems and should be able to try cases when States were unwilling to adjudicate or when their systems were not independent or impartial. It could not, however, be a substitute for local courts or remove the State's primary obligation to administer justice.

79. The human rights of accused persons, victims and witnesses must be respected, and Cost Rica therefore firmly opposed the death penalty.

80. The Court's judges should be widely versed in criminal and international law, human rights and matters affecting women and children. They must be experienced and mature, and age should be no bar to their election.

81. The Court could be effective only if it had the full support of all States and was given the financial and human resources necessary for its operation.

82. Mr. BAIBOURTIAN (Armenia) said that, despite the existence of international instruments governing the law of war, there was in practice no real mechanism to punish individuals guilty of war crimes. The Court would help to plug that gap and no Government should have the power to intervene, or to reduce or reject its sentences.

83. Armenia agreed that the Court should have jurisdiction over genocide, crimes against humanity wherever committed, war crimes, and serious violations of humanitarian law in both international and non-international

armed conflict, as well as over crimes of aggression and terrorism. However, a clear definition in the Statute was needed for each of the crimes over which the Court had jurisdiction so as to avoid misunderstandings and differing interpretations in the future.

84. For instance, under Article 51 of the Charter, a State had the right to self-defence, but in some cases that right could be interpreted as an act of aggression. That might also be true when the right of self-determination was asserted by a region within the territory of a State. A clearer definition of aggression was therefore needed.

85. With respect to the definition of acts constituting aggression, Armenia would like to see the definition of blockade expanded to include the blockade of the ports, coasts, territory and air routes of one State by the armed forces of another.

86. Armenia believed that the Court should have automatic jurisdiction over the crime of genocide.

87. The Court should be independent of the Security Council and of any States. States must not refuse to provide the Court with the information it required and must be obliged to comply with court orders. The Court must have the power to determine whether a State had complied in full with a court order. All States parties must give the Court the same cooperation and assistance that their authorities provided to their national courts. There must be effective guarantees for the protection of witnesses, victims and their families.

88. Since States were rarely willing to hold their own citizens, especially those holding political or military positions, accountable for crimes they might commit, his delegation supported the provision in the draft Statute giving limited but sufficient power to the Court to determine when States were unwilling or unable to act in a specific situation. That did not mean that the Court must act only when a national institution failed to do so, but, if an institution able to exercise jurisdiction existed, it would not be necessary for the Court to intervene. The Court should have the authority to determine whether there was such an effective national court.

89. Armenia was in favour of an independent Prosecutor able to initiate an investigation based on his or her findings or on information obtained from any other source, independently of a Security Council referral or a State complaint.

90. It also supported the idea of establishing a court with an independent international personality but working in close cooperation with the United Nations institutions. The United Nations should finance the establishment of the Court, and States parties should assume the financial burden only after a predetermined number had ratified the Treaty.

91. **Mr. AYUB** (Pakistan) said that his country supported the establishment of a Court which was independent, effective and enjoyed universal acceptance. However, since the Court should complement and not supplant national legal systems, Pakistan endorsed the principle of complementarity. The Court should exercise jurisdiction only if national trial procedures were not available or were ineffective, in order to preserve national sovereignty and avoid conflicts between the jurisdiction of the Court and that of the State. The exercise of jurisdiction by the Court should be based on the consent of the States concerned. The principle of complementarity must not be eroded, if the Statute were to enjoy universal acceptance.

92. Subject to that principle, Pakistan wished the Court to be impartial and independent of political influence of any kind. It was therefore not in favour of giving a role in the functioning of the Court to any organ of the United

Nations, in particular, the Security Council, which was primarily a political body, since that might cloud the Court's objectivity.

93. Pakistan favoured the principle that the trigger mechanism should be activated by the State concerned, since it alone was in a position to determine whether it had the competence to try the offender itself or would refer the case to the Court if it determined that the national jurisdiction would fail to deliver justice.

94. His delegation supported the concept that the Court's jurisdiction should be limited to the core crimes of genocide, serious violation of the laws and customs applicable in armed conflicts and crimes against humanity. However, the scope of those crimes needed clear definition.

95. Adoption of the Statute by consensus would facilitate both universal adherence and early entry into force.

96. **Mr. AL-KULAIB** (Kuwait) said that an international criminal court must be effective and independent. It should deal with crimes such as genocide and war crimes, and its mandate, and hence the text of the Statute, must be absolutely clear. The Court must be complementary to domestic legal systems and not try to supersede them.

97. His delegation endorsed the views of the speakers who had called for the inclusion of sexual violence, including acts of aggression against women in the course of war crimes, rape, sexual slavery and paedophilia in the Court's term of reference.

98. The draft Statute was still somewhat equivocal concerning the powers of the Prosecutor. His delegation believed that the Prosecutor must have a broader role but that decisions as to whether or not to prosecute should be open to appeal.

99. His delegation believed that the United Nations should provide permanent financial support for the Court.

100. **Mr. BERNHARDT** (Observer for the European Court of Human Rights) said that the offences over which the International Criminal Court would have jurisdiction must be clearly defined in order to achieve the full effect of deterrence, avoid any doubts as to jurisdiction and ensure respect for the principle of legality.

101. He urged the Conference not to accept the option under article 75 (e) of the draft Statute, which envisaged the death penalty.

102. The notion of complementarity called to mind the principle of subsidiarity which lay at the heart of the system of the European Convention on Human Rights. The European Court's message had always been that subsidiarity was a means of ensuring that national courts played their rightful role as far as possible, thus making adjudication at the international level unnecessary. The true function of complementarity in the proposed system of international criminal jurisdiction should be to encourage the competent national courts to carry out their duties, but, if they failed to do so, to ensure that there was no escape for the perpetrators of atrocities.

103. On the issue of optional jurisdiction, the experience of the European Court showed that an effort should be made to secure agreement on compulsory jurisdiction for core crimes. The effective protection of victims and potential victims required compulsory jurisdiction from the outset.

104. He believed that the principle that the Prosecutor should be allowed to trigger the Court's jurisdiction of his or her own accord was important, if not essential, for the effectiveness and credibility of the institution.

105. **Ms. KIRK McDONALD** (Observer for the International Criminal Tribunal for the Former Yugoslavia) said that participants in the Conference should draw upon the experience of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, which provided a wealth of information concerning the application of international humanitarian and criminal law.

106. An international code of criminal procedure combining aspects of civil law and common law had been created by the ad hoc Tribunals. She urged the Conference to consider the importance of including among the judges persons with prior judicial experience both in national and international criminal trials.

107. Experience in the Yugoslavia Tribunal had shown that the unequivocal obligation to comply with orders, not just requests, by the Court was essential. Grounds for refusing to comply should not be allowed. Moreover, it was essential that the ICC Prosecutor and defence counsel be able to conduct interviews and on-site investigations on the territories of States, without any unwarranted interference by a national authority.

108. The Tribunal's rules allowing for separate and dissenting opinions had proved highly beneficial to the development of international criminal law, and the availability of differing interpretations of that embryonic body of law had contributed to its maturation. She therefore hoped that there would be a full debate on that matter and that earnest consideration would be given to the bracketed proposal in article 72.6, which would allow for dissenting opinions.

109. She hoped that the Court would be effective and be vested with the necessary power to ensure that the parties and judges had access to all the relevant and appropriate evidence necessary to reach a just verdict. It was absolutely vital that the Court be endowed with the component of compulsion.

110. **Mr. KAMA** (Observer for the International Criminal Tribunal for Rwanda) said that his experience had shown it to be important that ICC judges be involved in the adoption of the procedures or have the possibility of amending them, given the practical difficulties they would undoubtedly encounter.

111. The experience of the ad hoc Tribunal showed that most of the evidence received had been in the form of testimony, and that it was essential to give adequate protection to witnesses before, during and after the trial, to ensure that they would agree to appear in court to answer questions. The protection of witnesses should be left to the Court unless it concerned a State party to the trial.

112. Another issue of major importance was cooperation by States at all stages. It must be possible to draw the Security Council's attention to actions carried out with the support of a State party.

113. He hoped that the establishment of the Court would not involve so many compromises as to make it ineffectual. What was needed was a court independent of political and other outside legal considerations, with a Prosecutor who would act independently.

114. **Ms. BONINO** (Observer for the European Community) said that there was a particular need for an international criminal court at a time when many barbaric local wars were being waged. Conflicts between national armies had been replaced by bloody internal and ethnic conflicts where civilians were not accidental casualties but the primary target of attacks, where crimes against humanity and even genocide were not just a means but a purpose of the conflict, and where the minimum standards of humanity agreed under international humanitarian law were violated as a matter of policy, not by accident.

115. The Court should have jurisdiction over a core group of crimes: genocide, crimes against humanity and war crimes, including those committed in the course of civil wars and other internal conflicts. It should have a constructive relationship with the Security Council and other international institutions. Moreover, it should have a strong, effective, highly qualified Prosecutor independent of Governments. It should have adequate procedures to ensure its fair operation, to safeguard the rights of the accused and witnesses. The Statute of the Court should have no provision for the death penalty.

116. **Mr. MARTINEZ** (Observer for the Inter-Parliamentary Union) said that the Statute of the Court would be subject to ratification. In most countries that would require action by the national parliament, which embodied the sovereignty of the State and, in a democratic system, was the most legitimate institution, representing civil society as a whole.

117. One of the key issues which parliaments examined when considering the ratification of an international agreement was how and to what extent national sovereignty was affected. Members would therefore pay particular attention to the concept of complementarity governing the Court's relationship with national courts. Most would agree that alleged criminals should normally be tried in their own national courts. It was precisely because that was not always effective that an international court was needed. The draft Statute laid down the principle that the proposed Court was intended to be complementary to national criminal justice systems in cases where such trial procedures might not be available or might be ineffective; that was a very important innovative concept.

118. The intent and content of that principle must be enunciated with the greatest possible clarity. Every State would want to know the circumstances in which its citizens might be brought to justice before an international criminal court. To achieve early ratification, the Statute must be clear, but every effort should be made to avoid the Court's becoming a token mechanism and to make it an effective tool for the defence of the rule of law throughout the world.

119. It was therefore extremely important that the Statute should be clear, unambiguous and juridically perfect. That would condition its chances of gaining the support of national parliaments, which would expect it to be no less high in technical quality than the legislative texts they considered daily; that would ultimately affect the extent of its implementation and the functioning of the Court. He intended to recommend to the Union's governing bodies, which would meet in September that year, that the Inter-Parliamentary Union—the world organization of national parliaments—should undertake a campaign amongst all its members to achieve the early ratification and entry into force of the proposed Statute.

120. **Mr. FERENCZ** (Observer for Pace Peace Center) said that limited ad hoc courts created after an event were hardly the best way to ensure universal justice: a permanent court was needed for permanent deterrence. Outmoded traditions of State sovereignty must not derail the movement towards establishing an international criminal court. Ever since the Nuremberg judgement, wars of aggression had undeniably been not a national right but an international crime. The Charter prescribed that only the Security Council could determine when aggression by a State had occurred, but it made no provision for criminal trials. No criminal statute could expand or diminish the Council's vested power. Only an independent court could decide whether an individual was innocent or guilty, and excluding aggression from international judicial scrutiny was to grant immunity to those responsible for it.

121. Carefully selected judges and prosecutors subject to public scrutiny and budgetary controls must be given the authority to carry out their task. To condemn crime yet provide no institution able to convict the guilty would be to mock the victims. An international criminal court—the missing link in the world legal order—was within the grasp of the Diplomatic Conference.

122. **Mr. SANE** (Observer for Amnesty International) said that abuses against women had been widespread in the conflict in Bosnia and Herzegovina. To combat rape as a weapon of war and crimes against humanity, Amnesty International called for the establishment of a permanent international criminal court, which should meet sixteen fundamental criteria, of which he would highlight two.

123. First, if the Court were to be an effective complement to national courts, it must have the right to exercise the same universal jurisdiction over genocide, other crimes against humanity and war crimes as each of the States parties to the Statute had under international law. Each of those core crimes were now crimes of universal jurisdiction. Any State might and in some cases must permit its courts to exercise jurisdiction over a person suspected of having committed one of those crimes and bring anyone responsible for it to justice, no matter where the crime was committed. It might do so without the consent of the State with custody of the suspect, the State where the crime was committed, the State of the victim's nationality, the State of the suspect's nationality or any other State. There was therefore no legal reason why the proposed new Court should not have the same powers.

124. Second, if the Court were to be effective, its judgements must be accepted as scrupulously fair and impartial by all sectors of the international community. Therefore, the Statute and the Rules of Procedure and Evidence must ensure that suspects and the accused had the right to a fair trial in accordance with the highest international standards.

125. Amnesty International, which had more than 1 million members and supporters throughout the world, agreed with the Prosecutors of the International Criminal Tribunals for the Former Yugoslavia and Rwanda that if the Court were weak and powerless, it would not only lack legitimacy but would betray the very human rights ideas that had inspired its creation. Amnesty International believed that such a court would be worse than no court at all, but it was confident that the Conference would create a court that it could support rather than one that it would oppose.

The meeting rose at 1.25 p.m.